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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1036

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HOUFF TRANSFER, INC., DOLPHIN FORWARDING INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,
Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner, International Longshoremen's Association, AFL-CIO ("ILA"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below

The majority and dissenting opinions of the Court of Appeals rendered on September 25, 1979, are not yet officially reported. They appear at pages 1a-74a of the Joint Appendix hereto.* The orders denying Rehearing and Suggestion for Rehearing *En Banc* appear at 169a-178a. The decision of the National Labor Relations Board issued on August 12, 1977 in *International Longshoremen's Association (Associated Transport, Inc.)* is reported at 231 N.L.R.B. No. 64 (1977) and appears at 77a-99a. The underlying opinion of the Administrative Law Judge appears at 117a-158a. The decision of the NLRB issued on May 30, 1978 in *International Longshoremen's Association (Dolphin Forwarding, Inc.)* is reported at 231 N.L.R.B. No. 64 and appears at pages 99a-117a. The underlying opinion of the Administrative Law Judge appears at 164a-166a. An order of the Administrative Law Judge striking all affirmative defenses appears at 158a-164a.

Jurisdiction

The judgment of the Court of Appeals was entered on September 25, 1979. The orders denying Rehearing were entered on December 13, 1979. This Petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether collectively bargained work rules, which seek to retain for longshoremen their historic task of

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* These and the following referenced opinions, being voluminous, are reprinted in a separately bound Joint Appendix to the Petitions of ILA and of Council of North Atlantic Shipping Associations ("CONASA"), concurrently filed with the Court. It is submitted simultaneously herewith and is referenced herein "—a".

loading and unloading ocean-going cargo at the piers against the threat of a technological innovation, which permits equipment owned or controlled by longshore employers to be moved inland for cargo handling, had the primary objective of preserving and protecting the traditional work of ILA longshoremen so as to be lawful under the doctrine of work preservation enunciated by this Court in *Naitonal Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967)?

2. Whether, under national policy on work preservation, the NLRB erred when it found a violation of Labor Management Relations Act §§ 8(b)(4)(B) and 8(e) on the basis of its definition of "the precise work in controversy" as that of the employees of consolidators rather than that of longshoremen, i.e., the work generated by technological innovation rather than the historic work of the employees threatened and/or displaced by the technological change?

Statutory Provisions Involved

The following relevant statutes appear at the indicated pages of the Joint Appendix:

§ 8(b)(4) of the Labor Management Relations Act 1947, as amended, 29 U.S.C. § 158(b)(4) ... 166a

§ 8(e) of the Labor Management Relations Act 1947, as amended, 29 U.S.C. § 158(e) 168a

Statement of the Case

This Petition seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit which reversed and vacated an order of the National Labor Relations Board that collectively bargained work rules, known as the Rules on Containers, violate the second-

ary boycott and hot cargo provisions of the National Labor Relations Act (NLRA), §§ 8(b)(4)(ii)(B) and 8(e), 29 U.S.C. § 158(b)(4)(ii)(B) and 158(e).

The Rules on Containers are a response to the impact of technology on the longshore industry. Historically, the handling of ocean cargo has been the work of longshoremen employed at the piers by vessel carriers and/or stevedores. This included not only the piece-by-piece receipt and delivery of the goods but also sorting, checking, storage, palletizing, repair, maintenance of the cargo, and virtually all of waterfront terminal functions. With the advent of containerization, the traditional method of handling cargo was changed and longshore work opportunities drastically reduced.

Containers are large, reusable, metal receptacles (some capable of carrying 30,000 pounds of cargo), which can be loaded on or unloaded off an ocean vessel intact. Their nature and variety are such they may contain cargo of virtually any kind or configuration. Container ships, which first appeared in 1957, are specially designed and constructed to carry containers.*

Vessel carriers understandably welcomed containerization not only in its labor-saving aspects but also because of the increased productivity it affords the vessels which no longer need lay over in port for piecemeal unloading and loading between runs. On the other hand, longshoremen from the first recognized containerization as a serious

* This Court has already recognized that, for purposes of the Longshoremen and Harbor Workers Compensation Act, containers are the "functional equivalent of the hold of the ship" and that, their unloading, even ashore, constitutes the unloading of the ship. *Northeast Marine Terminal Company Inc.* v. *Caputo,* 432 US 249, 270-271 (1977). Similarly, for purposes of contract law and insurer's liability, the container has been recognized as "functionally a part of the ship", not merely a huge piece of cargo. *Leather's Best* v. *S. S. Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971).

threat to their work opportunities, a fear proved justified through the years.**

Pursuant to Congress' policy of leaving the resolution of disputes like those engendered by technology to the collective bargaining process, Petitioner ILA and representatives of employer groups have evolved the Rules which gave rise to the present case. The history has been one of heated labor strife. At first the ILA refused to handle any containers. The decade of 1958-1968 was marked with strikes and work stoppages as the parties unsucessfully tried tentative solutions acceptable to both sides. After a strike which lasted 57 days in New York and 100 days in other ports following expiration of a Taft-Hartley injunction, and with the aid of mediation by the Office of the President of the United States, an agreement of lasting duration was reached on January 12, 1969 which was incorporated in the 1968-1971 collective bargaining agreement.

In return for various considerations, the ILA significantly relaxed its insistence that all containers be stuffed and stripped by longshoremen.* This concession was premised upon the employers' adherence to a set of provisions in the 1968-1971 contract, known as the "Rules on Containers".

The pertinent provisions of the Rules provided that full-shipper-load ("FSL") containers (i.e., those carrying goods belonging to one beneficial owner or consignee and moving intact) would be loaded or unloaded onto ships without stuffing or stripping of their cargo by ILA members upon the payment of a symbolic royalty on cargo tonnage. Similarly, consolidated ("LTL") containers (i.e.,

** In the period September 30, 1958 to September 30, 1976, despite the fact that tonnage passing through the port had doubled, statistics in the Port of New York showed a loss of 19,365 longshore jobs and/or 23,140,549 hours of work.

* "Stuffing" is the loading of a container with cargo; "stripping" is the removal of goods from a container.

those holding goods of several shippers or consignees and loaded by shipper/receiver service organizations, known as "consolidators") might also be handled intact *provided* that the actual consolidation took place more than fifty miles from the center of the port.

The purpose of the fifty-mile radius was to permit employers and their customers to take advantage of the technology of containers while at the same time minimizing the destructive effects on the work opportunities of longshoremen. Historically break-bulk goods had proceeded to the docks to be handled by longshoremen. Even now, the work of unloading or loading containers remains in the control of the vessel owning employers of ILA members, who own or lease the containers. The work could be performed, was performed and continues to be performed by longshoremen at the piers. However, to reduce their direct ILA labor costs, the steamship carriers had encouraged and induced the performance of some of the traditional ILA pier work at the consolidators' off-pier facilities by granting preferential reduced shipping rates to the consolidators. Since the costs—and thus the rates—applicable off-pier were invariably less than those charged on-pier, the inevitable result was the siphoning of LTL cargo away from the piers to the consolidators' surrogate docks within an hour's drive of the port.

To counteract this loss of longshore work, the Rules provide that any consolidated containers originating within a 50-mile radius of the port must be loaded or unloaded by ILA labor at the pier. As the Rules evolved, this provision was a constant source of discord between the ILA and the employers. Throughout the period of the 1968-1971 contract, it became apparent that the carriers were failing to abide by the 50-mile rule. Containers released to off-pier consolidators were clandestinely returning over the piers.*

* This was accomplished by various subterfuges. Documentation was altered to make it appear that the containers had already been stuffed or stripped by longshoremen. Bills of lading were falsified to disguise consolidated loads as full-shipper-loads or as originating outside the 50-mile limit. Even bribery of key personnel was employed to avoid enforcement of the Rules.

This resulted in a resurgence of the labor strife which had marked the period prior to the adoption of the Rules. A coast-wide strike took place from October 1, 1971 until enjoined under the Taft-Hartley Act at the end of November. Indeed, the carriers' failure to abide by the Rules became so untenable that the ILA served notice on May 1, 1972 that, unless violations of the Rules ceased, the union would invoke its right under the contract to abrogate them in their entirety and reasserts its jurisdiction to stuff and strip all containers. Again in 1973 the industry was on the point of strike when the employers agreed to certain enforcement provisions known as the Dublin Supplement.

By the Supplement, the employers agreed: (i) to close down their own off-pier consolidation stations; (ii) to discourage violations of the Rules by raising the levy of liquidated damages per container found to have been released in violation; and (iii) to prevent further evasion of the Rules by the sole remaining alternative—not to release their containers to known consolidators with facilities within 50-miles of the port. These provisions of the Dublin Supplement, adopted solely to enforce the purposes and terms of the original Rules, gave rise to the instant case.* The Rules in their present development now form part of every ILA contract in 26 states in the eastern half of the nation.

The case for which review is sought is one of many engendered by the Rules. As early as 1970, charges were filed with the NLRB's New York Regional Director by

* The adoption of the Dublin Supplement did not put an end to labor unrest. In late March, 1975 the HA reopened the Rules contending that the carriers were not abiding by their contractual commitments. On April 28, 1975 the ILA invoked the renegotiation clause by suspending the Rules and began stripping all containers in all North Atlantic ports with the exception of full-shipper-loads. The present 1977 collective bargaining agreement was reached only after a major strike against container operators by longshoremen from Maine to Texas which lasted for more than two months in 1977.

International Container Transport Corp. alleging that the Rules violated LMRA §§ 8(b)(4) and 8(e). The Regional Director, sustained by the Board's General Counsel, dismissed the charges on the ground that the Rules were valid work preservation provisions. Thereafter, the unsuccessful charging party commenced litigation under the antitrust laws. The United States Court of Appeals for the Second Circuit upheld the rules as work preservative. *Intercontinental Container Transport Corporation* v. *New York Shipping Association, Inc.*, 426 F.2d 884 (2d Cir. 1970) ("ICTC").

Subsequently, the Board reversed its position and has maintained in a series of decisions that the Rules violate the secondary boycott and hot cargo provisions of the NLRA. In 1973, unfair labor practices were filed by two off-pier consolidators, Consolidated Express, Inc. and Twin Express, Inc. in the Port of New York. These charges were tried and rejected by Administrative Law Judge Arnold Ordman, himself a former General Counsel to the Board. Judge Ordman held that the Rules on Containers and the accompanying Dublin Supplement had valid work preservation objectives within the doctrine enunciated by this Court in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), and recommended dismissal of the charges.

The Board overruled Judge Ordman. *International Longshoremen's Ass'n. (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975). In so holding, it did not disturb his factual findings, but rather (re)defined the "precise work in controversy" to be that traditionally performed by the *consolidator's* employees at their off-pier premises, which the Board held that the ILA was seeking to acquire.

On review, the Second Circuit by a divided panel deferred to the Board's definition of the work in controversy and sustained its decision. *International Longshoremen's*

Association v. *N.L.R.B.*, 537 F.2d 706 (2d Cir. 1976), *cert. denied* 429 US 1041 (1977).* Judge Feinberg, dissenting, argued that the Board's position was a clear misconception of the holding in *National Woodwork,* which requires the definition of the work in controversy to be the work sought to be preserved, i.e., that of the complaining employees (here the ILA longshoremen), the work preceding—not following—the introduction of the new technology.

Thereafter, the charging parties in *Conex I* commenced an action in the United States District Court for the District of New Jersey for damages under § 303 of the Labor Management Relations Act (LMRA), 28 U.S.C. § 187 and under § 14 of the Clayton Act, 15 U.S.C.A. § 15, against the ILA and New York Shipping Association, Inc., which action is still pending (Civ. Action No. 76-1645, D.N.J.).

On a motion for summary judgment, the District Court, although indicating disagreement with the Board's definition of the "work in controversy", nevertheless held that defendants were collaterally estopped from relitigating the issue of a violation of the NLRA. *Consolidated Express* v. *New York Shipping Association et al.*, 452 F. Supp. 1024 (D. N. J. 1977), *rev'd. on other grounds,* 602 F.2d 494 (3d Cir. 1979). The decision, which involved a variety of issues, including not only collateral estoppel but the antitrust ramifications of the Board's finding of a violation of the labor act, was appealed to the United States Court of Appeals for the Third Circuit *Consolidated Express* v. *New York Shipping Association,* 602 F.2d 494 (3d Cir. 1979).** Petitions to have this Court review the decision

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* Hereinafter both the Board proceeding and the Second Circuit's enforcement will be referred to as (*"Conex I"*).

** This action and its subsequent appeal will be referred to herein as *Conex II.*

of the Third Circuit on the various issues in *Conex II* are presently pending (Nos. 78-1902, 78-1905).*

The case to which the present Petition is addressed arose from the charges of four consolidators in the Ports of Hampton Roads, Virginia, Baltimore, Maryland and New York. On August 12, 1977, a divided three-member panel of the NLRB, relying in greater part on *Conex I*, held that the application of the Rules in Baltimore and Hampton Roads violated the Act.** *International Longshoremen's Association, AFL-CIO (Associated Transport, Inc.)*, 231 N.L.R.B. No. 64 (1967), reversed and vacated Nos. 77-1735

* At this Court's request, the Solicitor General submitted a brief on the petitions in *Conex II* setting forth the view of the United States that, although the issues on that case were significant, they might not be ripe for review by the Supreme Court in that they should await resolution of the underlying labor law issues in the case at bar. The denial of rehearing by the Court of Appeals and the present petitions for certiorari obviate that difficulty and bring the two cases in tandem. That the United States pointed out the importance of the issues in this case is further reason why the present petition should be granted and all of the issues engendered by the Rules on Containers litigation be resolved.

** The Virginia case had already given rise to two decisions touching on the Rules. In *Humphrey* v. *International Longshoremen's Association, AFL-CIO*, 401 F.Supp. 1401 (E.D. Va. 1975), *rev'd.* 548 F.2d 494 (4th Cir. 1977) District Judge Robert H. Mehrige, Jr., refused to issue a preliminary injunction under NLRA § 10(1), 29 U.S.C. 160(1), holding that the Board's Regional Director did not have a reasonable cause to believe that the Rules on Containers violated the provisions of the labor act in that, as a matter of law, the Rules fell under the work preservation doctrine of *National Woodwork*. He was reversed by a divided panel of the Fourth Circuit which found that, in the light of the Second Circuit's decision in Conex I the Regional Director did have reasonable cause. *Humphrey* v. *International Longshoremen's Association, AFL-CIO*, 548 F.2d 494 (4th Cir. 1977). Circuit Judge J. Braxton Craven, Jr., vigorously dissented, going to the substantive issue involved and finding on reasoning similar to that of Judge Fienberg's dissent in *Conex I* that the Rules were work preservation.

and 77-1759 (D.C. Cir. September 25, 1979) (unreported). In the New York case a decision of the Administrative Law Judge which, in reliance on *Conex I*, struck all defenses and found a violation of the NLRA, was sustained by the Board. *International Longshoremen's Association, AFL-CIO (Dolphin Forwarding, Inc. and San Juan Freight Forwarders, Inc.)*, 236 N.L.R.B. No. 42 (1978), reversed and vacated No. 78-1510 (D.C. Cir. September 25, 1979) (unreported).

Petitions for enforcement and review of the two Board decisions were consolidated and gave rise to a split decision of the District of Columbia Circuit. In an exhaustive opinion, Chief Judge Wright for the majority agreed with the reasoning of the dissents of Judge Feinberg and Judge Craven and found that the NLRB had erred as a matter of law when it defined the work in controversy to be that of the consolidators' employees instead of looking to the traditional work of longshoremen. The Court of Appeals reversed and vacated the Board's order. Petitions for Rehearing *En Banc* filed by the NLRB and by various intervenors were denied.

As in the *Conex* cases, two of the charging parties involved in the District of Columbia Ciircut case have commenced actions for damages under LMRA § 303 and the antitrust laws. *Houff Transfer, Inc.* v. *International Longshoremen's Association, AFL-CIO*, Civil Action No. T-74-1336 (D. Md.) and *Dolphin Forwarding, Inc.* v. *International Longshoremen's Association, AFL-CIO*. No. 79-276 (D. N.J.). These pending cases involve issues similar to those dealt with in the Third Circuit's decision in *Conex II*.*

* Still other litigation over the Rules is also pending. On September 28, 1979, following the decision of the District of Columbia Circuit, the NLRB issued a decision again finding that the Rules violated the NLRA in the Port of Balitimore, *International Longshoremen's Association, AFL-CIO (Beck Arabia,*

(footnote continued on following page)

The instant petition presents the unusual situation where the party seeking review by this Court was successful in the Court of Appeals. As the situation now stands, there exist conflicting holdings by two Circuits with respect to the Rules in the Port of New York, widespread judicial disagreement nationwide as to the legality of the Rules, subsequent Board decisions contrary to the holding of the District of Columbia Court (one involving the Port of Baltimore, covered by the Court's decision), prospective appeals to still three other Circuits which have not yet taken a definitative position on the Rules, and various private actions. The present ILA contract expires September 30, 1980. Negotiations for a new contract, which will govern all ports from Main to Texas, are due to comence in the Spring of 1980. In these circumstances, a decision of this Court determining once and for all the validity of the Rules and applying a national standard is necessary for the reasons hereinafter set forth.

(footnote continued from preceding page)

Ltd.), 245 N.L.R.B. No. 172 (1979). On the same date, the Board issued a decision finding the Rules violated the NLRA in the Port of Jacksonville, Florida *International Longshoremen's Association, AFL-CIO Local Union No. 1408* (Puerto Rico Marine Management, Inc.) 245 N.L.R.B. No. 171. Petitions for review of these Board decisions have been filed with the Fourth and Fifth Circuits, respectively. Still another case arising in the port of Philadelphia is presently before an Administrative Law Judge and will ultimately find its way to the Court of Appeals for the Third Circuit, which has yet to take a definite position on the legality of the Rules. See, *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor,* 555 F.2d 985, 989, fn. 5 (3d Cir. 1977). An action for a declaratory judgment with respect to the rights and duties of certain ILA employers with respect to the Rules is pending in the District Court for the Southern District of Georgia, Savannah Division. *Sea-Land Atlantic Division* v. *Local Union No. 1414, International Longshoremen's Association, AFL-CIO,* Civil Action No. 479-118 (S.D. Ga.).

Reasons for Granting the Writ

1. This Court Should Resolve A Manifest Conflict Between Circuits Which Has Serious Practical And Legal Consequences.

The conflict between the District of Columbia Circuit and the Second Circuit is not merely a matter of judicial untidiness. It is echoed in the widespread division among jurists who have passed upon the Rules* and has created serious practical and legal problems throughout the eastern circuits.

A. Competition Between Ports.

The Rules are presently lawful in some ports, unlawful in others and doubtful elsewhere. The ILA is already beset with queries from various locals as to whether, on the strength of the latest decision, the Rules may be enforced in their respective jurisdictions. The arising competition between locals in different areas is of public import in two respects. It bodes to give rise to selective local work stoppages with their attendant impact on the economy. More important, it fosters competition between ports. A diversion of cargo from one port to another, based on whether or not the Rules are enforceable in certain jurisdictions, must create a dislocation of trade and labor in contravention of the Congressional policy of national uniformity. Only an immediate ruling by this Court can avert internecine strife and the establishment of new patterns of commerce, which would not permit the restoration of the *status quo ante* even if a definitive resolution is finally rendered in the future.

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* The disagreement was further evidenced even within the Court of Appeals for the District of Columbia, where the bench split 5-4 on whether rehearing *en banc* should be granted.

B. Chaos In The Port of New York.

The Port of New York is presently governed by two conflicting rulings. The Second Circuit's enforcement of the Board's order in *Conex I* is a continuing mandate that the Rules violate the NLRA and are unenforceable not only against the charging parties therein but against all consolidators. The District of Columbia Circuit has held that the Board has not established a violation of the NLRA and has vacated an order against enforcement of the Rules in the Port of New York. The facts giving rise to the two decisions are indistinguishable.

Thus, the ILA, despite the scholarly and exhaustive opinion of the District of Columbia Circuit, still cannot enforce the Rules in the nation's leading port without violating the judgment of the Second Circuit. To attempt enforcement *even against the charging party in the District of Columbia Circuit case* would be to risk contempt proceedings.*

Petitioner respectfully urges that it should not be required to expose itself to criminal sanctions to have its rights in the matter resolved. This is a matter of justice but also of social concern. The health and tranquility of the nation's leading port are involved.

C. The Likelihood of Further Judicial Discord

The conflict between circuits in the case at bar especially requires resolution by this Court because one of those Courts is the Court of Appeals for the District of Columbia and review of an administrative agency's decision is involved.

Conflicts between two circuits covering different geographic areas might be tolerable. At least the parties in

* A converse interpretation of the legal situation would, of course, give the two charging parties in *Conex I* a virtual monopoly on the consolidation trade in the Port of New York.

each circuit would know what the law in that particular jurisdiction was. But, where a federal agency is involved, petitions for review and/or enforcement can always be made to the District of Columbia Circuit.* 29 U.S.C. § 2343. Since that Court has already held that the Rules are lawful, petitioners herein would always seek review of any further Board decisions in that forum. Conversely, the NLRB would seek review by any Court of Appeals of the geographical area where the matter arose which had previously decided in the Board's favor. Thus, the legality of the Rules, with its effect upon both management and labor—and its consequent possible civil liability—would depend on the mere chance of which court heard the review rather than upon a rule of law. Indeed, this serious legal and practical issue would turn on who won the race to the courthouse door.

D. Unnecessary And Duplicative Litigation.

A decision by this Court resolving the conflict between circuits would have the salutary effect of immediately disposing of the pending litigation over the Rules in at least three additional circuits, as well as numerous pending and prospective NLRB proceedings and private suits. The ILA has an obvious interest in avoiding the re-litigation of matters which can ultimately be resolved only at the national level. The courts themselves and the public have an interest in avoiding redundant and unnecessary lawsuits. This is reinforced by the fact that, *sans* a decision by this Court, the existing judicial conflict will only be expanded and aggravated with even more widespread effect on commerce and labor in the areas involved.

* In the instant case, two of the cases reviewed arose in the geographical territory of the Fourth Circuit, two in the Second Circuit.

E. The Possibility Of Injuries In Collateral Litigation.

While *Conex II* presently before this Court on petitions for certiorari to the Third Circuit, and similar private actions involve serious, independent issues of their own, all all are predicated upon a finding that the Rules violate the NLRA, as the Solicitor General has noted. The outcome of the various private suits would be largely determined by a decision of this Court of the underlying labor law question presented by the case at bar and by *Conex I*.

This necessity for such resolution is illustrated by the two civil cases pending before the same district judge in the District Court of New Jersey. Under his own ruling in *Conex II* affirmed by the Third Circuit, collateral estoppel bars re-litigation of the underlying labor law violation determined in *Conex I*. Should this Court deny certiorari herein, the decision of the District of Columbia Court that there has been no violation would become equally final. In the case brought by Dolphin Forwarding, Inc., an intervenor herein, the same judge would have to apply collateral estoppel that there has been *no* violation of the labor law and dismiss the action. Thus, on identical facts and under the same statutes, one plaintiff would be successful, the other would be unsuccessful in the same court.

To fully dispose of the litigation over the Rules on Containers, to guide the federal judiciary in several pending cases, and to avoid the threatened injustice, this Court should determine the legality of the Rules.

2. A Decision By This Court Is Required To Avert A Breakdown Of The Collective Bargaining Process and Inevitable Labor Strife In An Industry Vitally Affecting The National Economy

Fundamental to national labor policy is the decision of Congress that the private sector, through collective bargaining, deal with such issues as automation. The present

judicial impasse over the Rules on Containers effectively precludes both labor and management from resolving in their forthcoming negotiations the problem of containerization, which has beset the longshore industry for two decades. Unless a definitive ruling is forthcoming, or least pending, from this Court, the 1980 contract negotiations bode to give rise to labor unrest even more aggravated than that which has *afflicted* the industry since 1959.* The effects of this on the national economy in its present condition make the problem one of national and immediate importance.

A. The Impediment To Collective Bargaining.

The threat of unrest springs not from the designs of either management or labor but from the fact that negotiations must take place without that certainty of law which is essential to any bargaining process. The Rules on Containers are the specific response of the longshore industry in the eastern half of the nation to the problem of automation. They represent a genuine compromise in which the interests of management in technological progress and those of labor in job security and the preservation of work opportunities have been delicately balanced. They were consciously drawn with a view towards this Court's decision in *National Woodwork, supra.* Originally, they were sanctioned by the NLRB's Regional Director and General Counsel, by the Second Circuit for antitrust purposes, and by the first Administrative Law Judge to

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* Lengthy strikes occurred on the Atlantic and Gulf Coasts in 1959, 1962, 1964, 1968, 1971 and 1977. In 1968 and again in 1971 the President of the United States sought and obtained Taft-Hartley injunctions premised on a national emergency. The period of claim from 1971 to 1977 roughly coincides with the period from adoption of the Rules in their latest form until the effects of the Second Circuit's decision in *Conex I* were felt. Thereafter, another strike (against automated carriers only) ensued in 1977.

pass on their legality—always precisely as work preservation. Since the Board's change of position in *Conex I,* however, they have been a source of judicial discord and economic privation.

The contract to be negotiated in 1980 will cover ports in 26 states. Virtually all foreign commerce in the eastern half of the nation will be involved. The Rules have been the backbone of the collective bargaining agreement as it applies to automation and job security since 1968. As matters now stand, the legality of the Rules varies from jurisdiction to jurisdiction. Collective bargaining on this fundamental issue has become a practical impossibility because the parties do not know what the law is. Moreover, they must bargain under the threat of civil liability in the event one court or another invalidates any agreement they might reach. Until this Court asserts a nationally binding rule, the parties are unable to negotiate a contract of uniform application.

B. The Prospect Of Continued, Aggravated Labor Unrest.

There can be no doubt that the 20-year history of containers has witnessed a corresponding decimation in longshore work opportunities. The ILA is under an express mandate from its membership to seek to protect their jobs against the continuing threat of containerization. The Rules are an attempt to fulfill that duty and, in the 20 years of their evolution, the union has eschewed pursuing other approaches to the problem of automation. However, if the 1980 contract is to be negotiated in the present legal No Man's Land, the parties will have no choice but to explore other alternatives. Naturally, the ILA hopes that this Court will ultimately uphold the Rules, but that is not the paramount concern on this petition. What is essential is an answer,—one way or another,—a certain rule of national application within which the parties can bargain—

or, at least, the assurance that an answer will soon be forthcoming.*

Otherwise, management, with the threat of antitrust exposure like that in *Conex II,* will not be likely to risk new exposure. The ILA, which rightly or wrongly perceives the NLRB's attack on the Rules as having deprived it of consideration honestly bargained for without a return of the *quid pro quo,* is not likely to be accommodating. In short, the negotiations which are scheduled to commence in a matter of months must take place in an atmosphere of distrust and hostility, of "once burnt, twice shy",—a sure prescription for lockouts and/or strikes.

C. The National Significance.

The ILA is particularly anxious to avoid future labor strife because it knows the working man suffers most from such occurrences. More important for purpose of this petition is that the consequences of such unrest will touch not only ILA members and their employers but the nation as a whole. That the prior strikes engendered during the evolution of the Rules gave rise to Taft-Hartley injunctions *ipso facto* establishes the national importance of work stoppage in the longshore industry. Such injunctions presuppose recognition by the executive and judicial branches of a national emergency.** Any disruption of trade in the near future, when the state of the economy is less healthy than when earlier unrest occurred, will have an even more devastating impact.

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* What is necessary to the negotiations is that certiorari will have been granted in a case going to the merits of the Rules by the time bargaining begins. If no final decision has yet been rendered, the parties can take practical steps to accomodate a short delay. But to commence negotiations with no decision on the horizon would be destructive of the collective bargaining process.

** The convening of a Presidential Board of Inquiry pursuant to LMRA § 206, 29 U.S.C. § 176, in 1968 was further recognition that labor strife in this industry would "imperil the national health or safety."

This Court, as a co-equal branch of national government, should address and resolve an issue of truly national proportions, so as to avert a situation which threatens the entire economy.

3. This Case Involves A Question Of National Importance Affecting All Organized Labor And The Free Flow Of Commerce.

The underlying issues in this case are not limited to the Rules on Containers or to the longshore industry. Even if they were not in danger of precipitating serious disruptions of the national economy, they involve the doctrine of work preservation, an area of vital interest to all organized labor, as witnessed by the variety of industries which have already given rise to litigation over this question. Indeed, in this era of rapid technological change, the impact of automation is, perhaps, the single most important problem facing both labor and management. The present state of uncertainty, of which the Rules are only the occasion, extends to every organized industry. Its continuation poses a recurrent threat to labor peace and the national economy and at the same time frustrates the manifest will of Congress that there be a uniform, national labor policy in the interest of the free flow of commerce. Only a decision by this Court can restore the certainty which the rule of law, the will of Congress and the national well-being require.

This Court has found in the very existence of the NLRB itself the specific intent of Congress that national labor policy be uniformly applied. *San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36* v. *Garmon,* 359 U.S. 236, 242 (1959); *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776,* 346 U.S. 485, 490 (1953). This end is frustrated where, as is now the case, different rules of law vitally affecting commerce apply in various jurisdictions. It is for this Court to make the delicate adjustment

of the conflicting circuits by exercising its authority as final arbiter of the commerce clause. *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429, 440 (1978); *Southern Pacific Co.* v. *State of Arizona,* 325 U.S. 761, 769 (1944); *Morgan* v. *Commonwealth of Virginia,* 328 U.S. 373 (1945).

Since the curtailment of commerce and the frustration of the collective bargaining process both spring from judicial and administrative disagreement as to the meaning of prior decisions of the Supreme Court, only this Court can avert the impending evils. Prompt and definitive resolution of the conflict among circuits and clarification of the doctrine of *National Woodwork* are necessary to make workable the congressional policy of deference to the private sector and to prevent continuing and widespread strife in every area of the economy.

Conclusion

WHEREFORE, for the reasons above stated, Petitioner ILA respectfully submits that a Writ of Certiorari should be granted.

Respectfully submitted,

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